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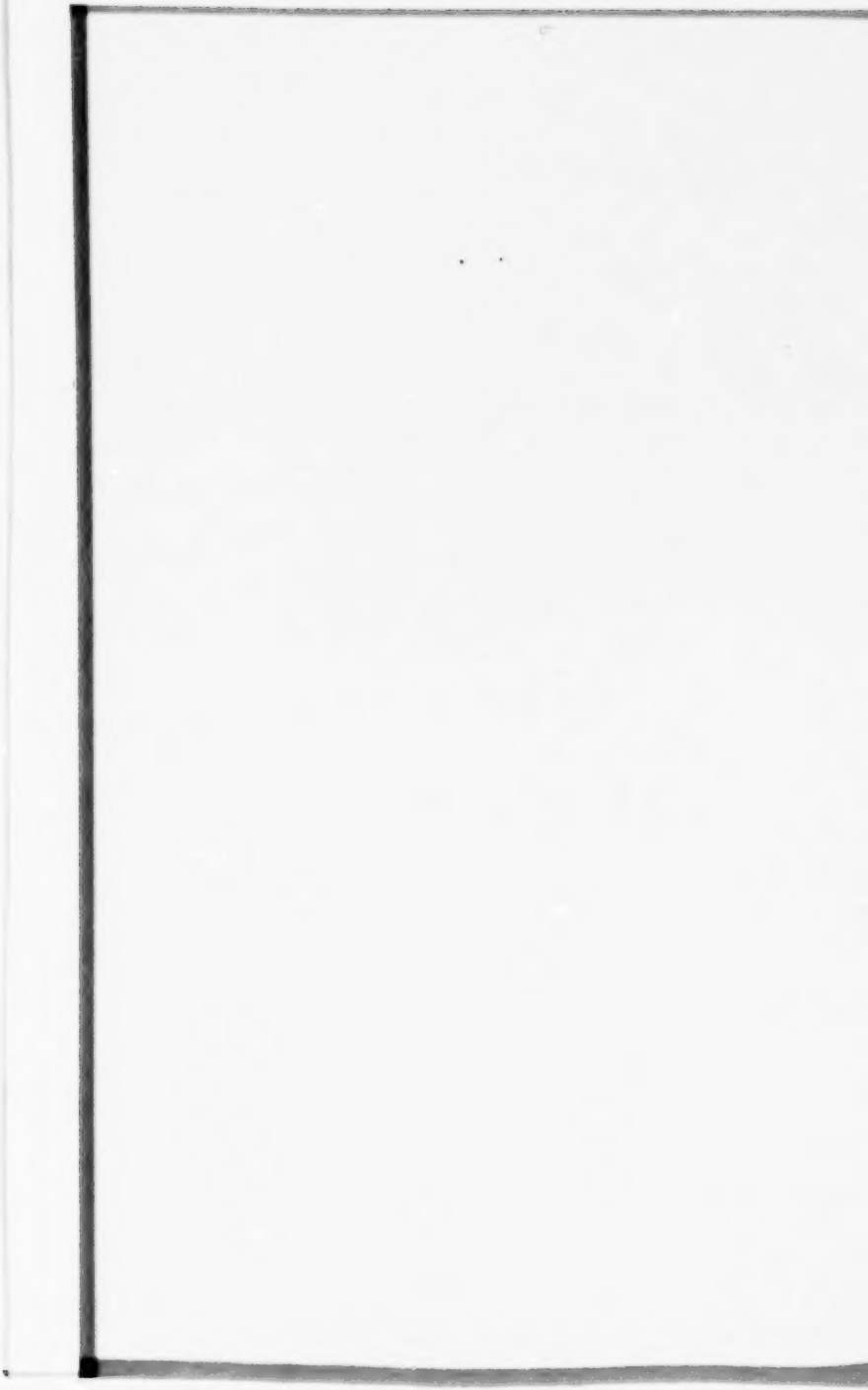

COURT OF APPEALS OF THE STATE OF NEW YORK

OCTOBER TERM, 1946

No. 940

HILL PACKING COMPANY,

Plaintiff-Respondent,

vs.

THE CITY OF NEW YORK, WILLIAM O'DWYER, MAYOR OF THE CITY OF NEW YORK; ISRAEL WEINSTEIN, ACTING COMMISSIONER OF HEALTH AND MEMBER OF THE BOARD OF HEALTH OF THE CITY OF NEW YORK; ROBERT McCURDY MARSH, HAVEN EMERSON, THOMAS M. RIVERS AND DAVID M. HEYMAN, MEMBERS OF THE BOARD OF HEALTH OF THE CITY OF NEW YORK, AND ARTHUR W. WALLANDER, POLICE COMMISSIONER OF THE CITY OF NEW YORK,

Defendants-Appellants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States the plaintiff, Hill Packing Company, submits herewith its statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the order and judgment of the Court of Appeals of the State of New York

entered in this cause on July 23rd, 1946. A petition for appeal is presented to the Chief Judge of the said Court of Appeals herewith on October 18th, 1946.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by appeal the final order and judgment in favor of the validity of the ordinance complained of, entered in this cause, is conferred by Section 237(a) of the Judicial Code, 28 U. S. C., Section 344(a), and 28 U. S. C. A., Section 344(a).

The pertinent provisions of such statute, to the extent relevant here, read as follows:

> "Section 344(a). A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861(a) of Title 28 of the United States Code.

The following decisions sustain the jurisdiction of the Supreme Court to review upon appeal the order and judgment in this case: *Zucht* v. *King*, 260 U. S. 174, 43 S. Ct. 24; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 48 S. Ct. 489; *Jamison* v. *State of Texas*, 318 U. S. 413, 63 S. Ct. 669.

The final order and judgment of the Court of Appeals of the State of New York which is now sought to be reviewed is dated and entered July 23rd, 1946. The application for appeal must be made within 3 months after the entry of said final order and judgment of the Court of Appeals, to wit, July 23rd, 1946. 28 U. S. C. § 350; 28 U. S. C. A. § 350;

Department of Banking, State of Nebraska v. *Pink*, 317 U. S. 264, 63 S. Ct. 233.

Statute Involved

The statute, the validity of which is involved, is Paragraph 4 of Section 327 of the Sanitary Code of the City of New York, as amended (Official Edition of the Sanitary Code of the City of New York published by the Department of Health, City of New York, page 108). Said Section 327 reads as follows:

> "Section 327. *Slaughtering of Horses and Sale of Horseflesh Regulated.*
>
> 1. The business of slaughtering horses shall not be conducted in the City of New York. No horseflesh shall be brought into, transported or held, kept, or offered for sale in said City without a permit therefor issued by the Board of Health, or otherwise than in accordance with the terms of said permit and the regulations of said board. Such permits when issued shall specify 'For Animal Consumption' or 'For Human Consumption.'
>
> 2. No carcass, or part of carcass of a horse shall be brought into the City of New York, or held, kept, sold, offered for sale or given away in said City, until it shall have been inspected and passed as fit for human food by a duly authorized inspector of the United States Department of Agriculture and shall have been marked, stamped or branded as having been so inspected and passed, or, in the case of parts of a carcass, unless such parts shall have been cut from a carcass or part of a carcass which had previously been inspected and passed and so marked, stamped or branded as hereinbefore provided.
>
> 3. Horseflesh shall not be used as an ingredient of or in the preparation of any mixed food intended for human consumption.

4. Horseflesh, whether alone or combined with other ingredients, intended for animal feed shall not be brought into the City of New York, transported, or held, kept, stored, or offered for sale or sold unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health. This provision, however, shall not apply to horseflesh sold and transported to the New York Zoological Society or the Park Department of The City of New York."

The Issues and Rulings Below

The action herein is for a declaratory judgment declaring that Section 327 of the Sanitary Code of the City of New York, as amended, violates plaintiff's rights and privileges in transporting and vending horseflesh in interstate commerce and that said section is an improper exercise of the police powers, is prohibitory and deprives the plaintiff of equal protection under the laws of the United States and the State of New York; and for a permanent injunction restraining the defendants from enforcing said Section 327 of the Sanitary Code of the City of New York, as amended.

The Federal questions sought to be reviewed were raised in the Court of the first instance by the pleadings. In its complaint plaintiff alleged that it is a foreign corporation organized in the State of Kansas (R., fol. 15); that the plaintiff was engaged in the preparation and sale of horseflesh both for human and animal consumption throughout the States of the United States and elsewhere, and has been and is engaged in interstate and foreign commerce (R., fols. 18, 19); that plaintiff transported from the State of Kansas to the City and State of New York, delivering and selling there horseflesh for use as animal food (R., fols. 21, 22); that plaintiff transported substantial amounts of horseflesh into the City of New York, said horseflesh being prepared under regulation and supervision of the Department

of Agriculture pursuant to United States statutes and regulations (R., fol. 24).

The complaint goes on to allege that horseflesh is a wholesome and nutritious article of food, both for human beings and for animals, and the horseflesh prepared by plaintiff, except meat mixed with ground bone, under the provisions of the Federal laws, have been stamped as fit and wholesome for human and animal consumption, and that such horseflesh is equal to beef in nutritive value (R., fol. 26); that on August 10th, 1943, Section 327 of the Sanitary Code of the City of New York was amended so as to include among its provisions Paragraph 4 set forth hereinabove (R., fols. 28-31); that because of the rules and regulations of the Bureau of Animal Industry of the United States it would be impossible for plaintiff to comply with the requirements of the local law (R., fol. 37); that the enforcement of said Section 327, as amended, would be prohibitory and has already seriously injured plaintiff in its business in interstate commerce between the State of Kansas and the State of New York, and that if enforcement of said section be not enjoined, plaintiff would be irreparably injured (R., fol. 40); that plaintiff's business has been and will be hampered, impeded and partially or wholly destroyed if such section were to be enforced (R., fol. 41); that plaintiff is one of the four largest dealers in horseflesh within the United States and the restriction of its business by enforcement of said Section 327 would cause irreparable injury; that said Section 327 violates plaintiff's rights under Section 8, Article 1 and Section 1, Article 14 of the Constitution of the United States (R., fol. 45); that said ordinance is void because of indefiniteness and because it is prohibitory (R., fol. 47); and that said ordinance is void and unenforceable because it is not a reasonable exercise of the powers of the Board of Health and is arbitrary (R., fol. 48).

These allegations in the complaint were put in issue by the denials contained in the defendants' answer (R., fols. 53-63). The answer also contained affirmative defenses alleging that said ordinance was designed to regulate the sale of horseflesh in the public interest (R., fol. 60); that it is the only law protecting the public from fraud in the sale of horseflesh (R., fol. 60); that said section was valid and necessary for the protection of the health and welfare of the residents of the City of New York and is not in conflict with any superior law (R., fol. 62).

Prior to the trial of this action application was made for a temporary injunction to restrain the enforcement of the ordinance pending final determination of the action. That application was granted. The opinion therein by Hon. Edward R. Koch, Justice of the Supreme Court of the State of New York, is appended hereto.

The case came on to be heard on March 19th, 1945, before Hon. Bernard L. Shientag, Justice of the Supreme Court of the State of New York. At the conclusion of the trial both plaintiff and defendant moved for judgment. Decision upon this motion was reserved by the Court (R., fol. 111). In its decision (contained in the opinion of Mr. Justice Shientag appended hereto and in the Record, at fols. 304-333), the lower court held that the section in controversy was not void for indefiniteness and was not discriminatory, but that it was an unlawful interference with interstate commerce in a national field in which Congress has enacted detailed appropriate legislation.

Judgment dated June 29th, 1945, was entered upon this decision on July 12th, 1945, declaring that Paragraph 4 of the amendment to Section 327 of the Sanitary Code of the City of New York is unconstitutional, invalid, void and unenforceable in that it is in violation of plaintiff's rights and privileges in interstate commerce, and enjoining the

enforcement of said Paragraph 4 insofar as said Paragraph 4 applies to horseflesh in interstate commerce.

Thereafter the defendants appealed to the Appellate Division of the Supreme Court of the State of New York, which said Appellate Division unanimously affirmed the judgment below without opinion.

Upon appeal by the defendants to the Court of Appeals of the State of New York from the judgment entered on the order of the Appellate Division affirming the judgment of the court below, the Court of Appeals unanimously reversed the judgments in the courts below and directed judgment adjudicating and declaring the rights of the parties in accordance with the views expressed in their opinion.

The opinion of the Court of Appeals is appended hereto and contains the views of the court with respect to the instant case and the *Quaker Oats* case, a companion action tried and argued together with the case herein. It is respectfully submitted that the rulings of the court as expressed in this opinion and decision, were of a nature to bring this case within the statutory provision believed to confer jurisdiction on the Supreme Court of the United States.

In its opinion, the Court of Appeals held that the ordinance complained of with respect to the plaintiff herein, Hill Packing Company, was not in violation of the Federal law under the interstate commerce clause; that the plaintiff herein must follow the ordinance's demands as to decharacterization until the Federal Government announces a definite method of decharacterization; that the ordinance in the meantime continues operative; that the ordinance is definite and certain; was within the legislative competence of the City to enact; was consonant with the requirements of the due process clause and the equal protection

of the law clause; and does not constitute an invalid delegation of the legislative power.

Pursuant to the direction of the Court of Appeals, a judgment was entered in the court below which declared that Paragraph 4 of Section 327 of the Sanitary Code of the City of New York is not being administered in a manner inconsistent with Federal law and may be enforced, and that said Paragraph 4 is sufficiently definite and certain; was within the legislative competence of the City of New York to enact; is consonant with the requirements of the due process clause and the equal protection of the laws clause and does not constitute an invalid delegation of legislative power.

The Questions Are Substantial

A substantial Federal question is involved herein, as clearly appears from the issues raised by the pleadings and from the decisions of all the courts which have passed upon the questions presented in this case. The Court of Appeals of the State of New York has stated in its opinion (appended hereto and reported in 295 N. Y. 527), "The question posed involves the constitutionality of an ordinance of the City of New York governing and regulating the sale of horsemeat intended for animal feed." It has been contended by the plaintiff in all the courts below that the ordinance was in conflict with Federal legislation occupying the same field, thus violating the commerce clause of the Constitution, and that the ordinance violated the due process and equal protection clauses of the Constitution.

Seven justices of the lower courts have sustained plaintiff's contentions, that the ordinance was invalid and unconstitutional. The Court of Appeals of the State of New York has held the ordinance to be constitutional.

Under the provisions of the ordinance complained of the plaintiff is required to "decharacterize" its product which under federal law is approved as "sound, healthful, wholesome and fit for human food", before such product may be "brought into the City of New York, transported or held, kept, stored or offered for sale". The plaintiff, Hill Packing Company, transports substantial amounts of horsemeat into the city for sale and reshipment to points outside the city. The provisions of the ordinance require plaintiff to adulterate and corrupt its product so as to seriously affect its marketability. Not only is such adulteration required by the ordinance, but it is contended that the provisions necessarily compel plaintiff to violate the Federal "Meat Inspection Act" (34 Stat. 674), the "Horsemeat Act" (41 Stat. 421), and the Regulations promulgated thereunder.

Furthermore, if the ordinance remains operative and the precedent set by the City of New York were to be followed by other municipalities throughout the various States of the Union, each with differing requirements as to decharacterization, plaintiff would be unable to transport and sell its product in interstate commerce. That the enforcement of the ordinance has already injured and will seriously injure plaintiff in its business appears from the testimony. Such testimony shows, among other things, that after the enactment of the statute, and until the issuance of the temporary injunction, the sale of plaintiff's horsemeat in the City of New York decreased in volume by one-half (R., fol. 177).

It is thus respectfully represented that for the foregoing reasons the questions involved in the appeal to the Supreme Court of the United States are of a substantial nature.

It is urged that the appeal herein should be entertained upon the well established principles that an appeal will not be dismissed for want of a substantial Federal question, unless the contentions of the appellant are "clearly not

debatable and utterly lacking in merit". *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258, 55 S. Ct. 197, 202.

Respectfully submitted,

ARNOLD J. BROCK,
Attorney for Hill Packing Company,
Plaintiff and Proposed Appellant.

APPENDIX "A"

Opinion of the Court of Appeals of the State of New York

(Reported in 295 N. Y. 527)

HILL PACKING COMPANY, *Respondents,*

vs.

CITY OF NEW YORK, et al., *Appellants*

QUAKER OATS COMPANY, *Respondent,*

vs.

CITY OF NEW YORK, et al., *Appellants*

Decided July 23rd, 1946

Appeal, in the first above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 8, 1946, unanimously affirming a declaratory judgment of the Supreme Court in favor of plaintiff rendered by the court after a trial at Special Term (Shientag, J.; opinion 185 Misc. 238).

Appeal, in the second above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 8, 1946, unanimously affirming a declaratory judgment of the Supreme Court in favor of plaintiff rendered by the court after a trial at Special Term (Shientag, J.).

FULD, *J.:*

In each of these actions for declaratory judgment, the question posed involves the constitutionality of an ordinance of the City of New York governing and regulating the sale of horse meat intended for animal feed. The courts below held it invalid as an unlawful interference with interstate commerce.

In 1943, paragraph 4 of section 327 of the Sanitary Code of New York City was amended to read as follows: "4.

Horseflesh, whether alone or combined with other ingredients, intended for animal feed shall not be brought into The City of New York, transported, or held, kept, stored, or offered for sale or sold unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health. This provision, however, shall not apply to horseflesh sold and transported to the New York Zoological Society or the Park Department of The City of New York." Violation of its provisions is punishable as a misdemeanor (Penal Law, § 1740; New York City Charter, § 558, subd. c; New York City Administrative Code, § 564-6.0), and, in addition, perhaps subjects the offending product to confiscation (Sanitary Code, § 137).

Both the Hill Packing Company and the Quaker Oats Company are engaged in the preparation of horse meat and in its sale throughout the country—the former from its plant in Kansas, the latter from its factory in Illinois. The product of the Hill Company, frozen and packaged in cartons, is intended for both animal use and human consumption; the product of the Quaker Oats Company, known as "Ken-L-Ration," packaged in hermetically sealed containers, is sold only as dog food. Labels on each company's product proclaim it horse meat and announce that the product has been inspected and approved by the Federal Government.

The Hill Company was advised by the city's department of health that it would have to decharacterize its product by adding either "ground bone" or some other ingredient, such as cod liver oil, coal tar dye, granular charcoal, or some harmless vegetable coloring. The city had advised the Quaker Oats Company that it might decharacterize its product by adding ground bone—as the concern indicated it planned doing—or by some other method.

It is well established that the commerce clause does not itself preclude a State—or municipality (Cuyahoga River Power Co. *v.* Akron, 240 U. S. 462)—from enacting legislation, in the exercise of its police power, regulating matters which affect interstate commerce. (Stone, C. J., concurring, Hill *v.* Florida, 325 U. S. 538, 544; Southern Pacific Co. *v.* Arizona, 325 U. S. 761, 766-767.) Equally settled is the rule that, even if the Federal Government has legislated in a

particular field, local regulation in that field is not necessarily prohibited unless national uniformity is essential. The State or municipal statute will be stricken only if—in terms or in practical administration—it conflicts with the Federal law or infringes on its policy. (Southern Pacific Co. *v.* Arizona, supra, at p. 766; Hill *v.* Florida, 325 U. S. 538; Union Brokerage Co. *v.* Jensen, 322 U. S. 202; Cloverleaf Co. *v.* Patterson, 315 U. S. 148; Allen-Bradley Local *v.* Board, 315 U. S. 740; Kelly *v.* Washington, 302 U. S. 1; Townsend *v.* Yeomans, 301 U. S. 441; Gilvary *v.* Cuyahoga Valley Ry. Co., 292 U. S. 57; McDermott *v.* Wisconsin, 228 U. S. 115; Savage *v.* Jones, 225 U. S. 501.)

Differentiation between cases where the assumption of Federal powers is exclusive and where it is not, is narrow, but the line has been drawn by the Supreme Court in a number of closely comparable cases dealing with the constitutionality of local legislation governing the preparation and sale of foodstuffs.

In Savage *v.* Jones (supra, 532) it appeared that the Federal law prohibited interstate shipments of food for domestic animals only if misbranded by bearing "any statement, design or device * * * false or misleading". Indiana enacted a statute which went further; it required that there be attached to every package of the article, offered for sale in the State while in interstate commerce, a tag or label specifying the ingredients of the foodstuff. The court held the State statute constitutional and wrote (225 U. S., at p. 532): "Congress has thus limited the scope of its prohibitions. *It has not included that at which the Indiana statute aims.* Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis?" (Emphasis supplied.)

However, in McDermott *v.* Wisconsin (supra) the State act was held invalid, since, according to the court, Wisconsin prohibited that which the Federal Government sanctioned. In that case, it appeared that, under the Pure Food and Drugs Act, the government permitted a product to be

sold simply labeled "Corn Syrup with Cane Flavor." The State enacted a law which, proscribing any other "designation or brand on the package," required glucose mixtures to be labeled "Glucose flavored with" the flavoring material. Accordingly, the State condemned a mixture bearing the label "Karo Corn Syrup" "10% Cane Syrup, 90% Corn Syrup," although, as indicated, it met the requirements of the Federal authorities. In ruling that the State could not require a label on articles in interstate commerce different from that which the Federal Government considered proper, the Supreme Court declared (228 U. S., at p. 133): "Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, *we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce*, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject." (Emphasis supplied.)

In the *Cloverleaf Company case* (supra) the petitioner was engaged in manufacturing renovated butter from packing stock butter. The Federal legislation subjected the business of making such butter to inspection, regulation, and condemnation of the final product if unfit for human consumption. Though requiring inspection of the raw material—packing stock butter—the Federal statute did not provide for its condemnation or seizure. Alabama enacted a regulatory law of its own which specifically empowered one of its officials to seize and condemn packing stock butter being held for renovation. Noting a conflict in that the State condemned what the government permitted, the court held the State legislation unconstitutional and said (p. 169): "Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory, while it was under federal observation and

while federal enforcement deemed it wholesome, *would not only hamper the administration of the federal act but would be inconsistent with its requirements.* Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject." (Emphasis supplied.)

Turning to the case at hand, it is our conclusion that the local provision is inconsistent with the requirements of the Federal law, for, as we view it, the city forbids to interstate commerce what the government has authorized. In reaching that decision, we consider the Federal law, not as it read at the trial, but as it reads today in its amended form (Civ. Prac. Act, §344-a, subd. A, par. 5; see Graybar Elec. Co. *v.* New Amsterdam Cas. Co., 292 N. Y. 246, 250), since rights and other legal relations are to be determined as of the time they are disclosed. As amended, the pertinent portion of the regulation provides (Code Fed. Reg., Supp. 1945, tit. 9, §268.12, par. [c]: "(C) Dog food or other animal food prepared, in whole or in part, from materials derived from cattle, sheep, swine, goats or horses, shall be distinguished from articles of human food, so as to avoid the distribution of such animal food as human food. *To accomplish this, labeling of hermetically sealed, conventional retail size containers as, for example, 'dog food' will be considered sufficient.* If not in such containers, the product must not only be properly identified, but it must be of such character or so treated (denatured or decharacterized) as to be readily distinguishable from an article of human food. Dog food shall not be represented as being a human food." (Emphasis supplied.)

The claim of conflict before this new regulation was promulgated rested, essentially, on the possibility that adding coloring matter or employing another method of decharacterization demanded by the city might offend against the Federal law. With the new regulation in force, however, there is no need to speculate about potential and hypothetical conflicts. The local statute insists upon the addition of harmless coloring or other means of decharacterization—permits the use of hermetically sealed con-

tainers, accompanied by appropriate labeling. Here we have a conflict, actual and open, on the very face of the two provisions.

The point is made, though, that the city has never withheld its consent to the use of hermetically sealed containers. That is immaterial. The ordinance endows the health authorities with no power to grant permission to use them. The ordinance is explicit; the product must "by harmless coloring or otherwise," be decharacterized. The term, though unusual and somewhat inartistic, clearly signifies some alteration of the product sufficient to change its character. Packing horse flesh in a hermetically sealed container cannot alter its character. While it may achieve the purpose for which decharacterization is required, it is not decharacterization.

Quite obviously, the ordinance does not supplement the Federal prescription; rather, it infringes upon it. Simply put, the government sanctions the use of hermetically sealed containers; the city adds a further requirement and burden. As expressed in the Cloverleaf case (supra, p. 158) and the McDermott case (supra, 133) "to permit such regulation as is embodied in this statute is to permit" a city "to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of the Federal law."

The inconsistency affects the Quaker Oats Company directly, since it markets its dog food in sealed containers. It is of no consequence that the company was not directed to alter its product. The ordinance is on the books and permits the enforcing agency no alternative, no discretion. It demands that the product be decharacterized, even though in hermetically sealed containers. Failure to comply with the provision calls for criminal punishment and other penalties. Regardless of the temper of the enforcing authority, regardless of its inclination, the ordinance places the product of the Quaker Oats Company, as well as its management, in jeopardy and gives rise to the essential "controversy." Under such circumstances, action for declaratory judgment and for an injunction properly lies. (Acorn Employment Service, Inc., *v.* Moss, 292 N. Y. 147,

153; cf. Good Humor Corp. *v.* City of New York, 290 N. Y. 312.) As Judge Loughran declared in the Acorn Employment case (p. 153): "We believe the Corporation Counsel is mistaken in his assumption that such commands can be reviewed only upon a showing of actual or imminent detriment resulting therefrom. (See Columbia System *v.* U. S., 316 U. S. 407, 417.)"

With respect to the Hill Packing Company, however, the situation is different. The conflict noted in the other case is not here present, for the Hill Company's foodstuff is not contained in hermetically sealed containers. Both under Federal and local law, it is required to decharacterize its product. If the decharacterization features of both controls be identically administered, the Hill Company will have no cause for complaint. Insofar as consistent, both statutes may coexist; the municipal agency may enforce its local law "at least until such time as it is ousted" by the Federal authorities exercising their own paramount jurisdiction. (Matter of Davega-City Radio *v.* Labor Board, 281 N. Y. 13, 24.) We need not now consider at what point the local department of health would be displaced, for, as stated in the Davega-City Radio case (supra) it "is sufficient that in the present case" the Federal department "has not acted" (p. 24).

That does not, however, mean that plaintiff Hill Packing Company is not entitled to a declaratory judgment. (Cf. Rockland Light and Power Co. *v.* City of New York, 289 N. Y. 45.) The potentiality of conflict in administration, particularly in view of the city's insistence upon compliance with the command of the ordinance, justifies a declaration of rights. As indicated, though, such a declaration may not invalidate the ordinance in advance of its being administered in a manner inconsistent with Federal law. Accordingly, the Hill Company must follow the ordinance's demands as to decharacterization—at least until the Federal Government announces a different method of decharacterization. In the meantime, the ordinance continues operative.

The other objections urged against the ordinance lack substance. Clearly, as Special Term ruled, the ordinance is sufficiently definite and certain; it was within the legis-

lative competence of the city to enact; it is consonant with the requirements of the due process clause (People *v.* Blanchard, 288 N. Y. 145; People *v.* Arlen Service Stations, 284 N. Y. 340; Carolene Product Co. *v.* United States, 323 U. S. 18; Nat. Fertilizer Assn. *v.* Bradley, 301 U. S. 178; Hygrade Provision Co. *v.* Sherman, 266 U. S. 497; Heath & Milligan Co. *v.* Worst, 207 U. S. 338; Plumley *v.* Massachusetts, 155 U. S. 461), and the equal protection of the laws clause (People *v.* Teuscher, 248 N. Y. 454; Matter of City of New York [Bronx River Parkway], 284 N. Y. 48; Matter of Stracquadanio *v.* Department of Health, 285 N. Y. 93); and it does not constitute an invalid delegation of legislative power. (Yakas *v.* United States, 321 U. S. 414; Sunshine Anthracite Coal Co. *v.* Adkins, 310 U. S. 381; United States *v.* Grimaud, 220 U. S. 506.)

Accordingly, insofar as the contention under the commerce clause is concerned, the ruling in the Quaker Oats Company case should be affirmed; the ruling in the Hill case should be reversed, and judgment directed adjudicating and declaring the rights of the parties in accordance with the views set out above.

The judgment in the Quaker Oats case should be affirmed, with costs. The judgments in the Hill Packing Company case should be reversed and judgment directed adjudicating and declaring the rights of the parties in accordance with the views expressed in this opinion, with costs in all courts.

Loughran, Ch. J., Lewis, Conway, Desmond and Thacher, JJ., concur; Dye, J., taking no part.

APPENDIX "B"

Opinion of Hon. Bernard L. Shientag, Justice of the Supreme Court of the State of New York, Rendered After Trial.

(Reported in 185 Misc. 238)

Hill Packing Co. v. City of N. Y.— This action is one for a declaratory judgment adjudicating that an amendment to section 327 of the Sanitary Code of the City of New York, adopted by the board of health on August 10, 1943, is un-

constitutional. The amendment in question constitutes paragraph 4 of section 327, and reads as follows: "4. Horse flesh, whether alone or combined with other ingredients, intended for animal food, shall not be brought into the City of New York, transported, or held, kept, stored, or offered for sale, or sold unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health. This provision, however, shall not apply to horse flesh sold and transported to the New York Zoological Society or the Park Department of the City of New York."

An application which was made by the plaintiff for a temporary injunction was granted by Mr. Justice Koch, sitting at Special Term, on June 21, 1944 (Hill Packing Co. v. City of N. Y., 182 Misc. 742). In a carefully reasoned opinion he held that the amendment was unconstitutional on the following grounds: that it was indefinite; that it was discriminatory; that it was violative of due process and was not justifiable under the police power; and that it was an unlawful interference with interstate commerce. No appeal was taken from that decision.

The conclusions I reach after trial are as follows: 1. The amendment in controversy is not void for indefiniteness. To be sure, "decharacterization" is a coined word and does not seem to carry any prior scientific or technical meaning. The object of the section, however, is apparent: To require some physical treatment of the horse meat that will prevent its confusion with beef. One method of so doing is specifically mentioned: harmless coloring. The fact that the board of health may allow alternative methods of "decharacterization" does not taint the requirement with indefiniteness or uncertainty (Connally v. General Const. Co., 269 U. S. 385, 391; Whitney v. California, 274 U. S. 357; Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502; Omaechevarria v. Idaho, 246 U. S. 343, 345; People, &c., v. Grogan, 260 N. Y. 138).

2. The amended section is not discriminatory. There is no discrimination against interstate commerce. An exception is made for horse flesh sold to the Zoological Society or to the park department. This, on its face, is a reason-

able classification, in view of the object of the provision, which is to prevent the perpetration of fraud in the sale of horse meat.

3. The amended section is an unlawful interference with interstate commerce, in a national field, in which Congress has enacted detailed appropriate legislation. It will be assumed for the purpose of this decision that unless limited by the exercise of federal power, under the commerce clause, the municipality acting under the authority delegated to it by the state had the power to enact the amendment to the Sanitary Code in controversy. The requirement of due process may be satisfied and still there may be an unlawful interference with interstate commerce. A state law may be good under due process and bad as against interstate commerce (Leisy v. Hardin, 135 U. S. 100). Moreover, "it appears now that there is a difference as to presumption of validity, at least where economic interests are involved, namely, that it runs against validity in commerce law cases, but in favor of validity in due process cases" (Noel T. Dowling, Interstate Commerce and State Power, 27 Va. Law Review, 1, 21, citing McCarroll v. Dixie Greyhound Lines, 309 U. S. 176).

The purpose of the amendment in question is not to prohibit the sale of horse flesh for animal or for human consumption. It is specifically conceded that horse flesh is just as nutritive and as healthful as beef. True, the thought of eating horse flesh is revolting to many; it is also cheaper than beef, and hence the state and municipality have an interest in preventing confusion of the two products. "Decharacterization" of horse flesh was required not to protect the public health, but to prevent the deception of the public. As the health commissioner himself points out, the purpose of the law is "that horse flesh cannot be sold to the consumer without his knowledge." "Horse flesh," he says, "is one kind of food that the city is not going to permit to be foisted upon an innocent and unsuspecting public. To prevent this fraud and deceit, the law requires decharacterization."

The plaintiff's products are transported in interstate commerce and their sale in New York is an incident of

interstate commerce (Savage v. Jones, 225 U. S. 501, 520). More than this, every operation of plaintiff's packing plant, in another state, is under the constant direction and control of the officials and inspectors of the Bureau of Animal Industry, a branch of the United State Department of Agriculture. The plaintiff's products are labelled "horse meat" and, except when ground with bone, are stamped by the federal agency as fit for human consumption. All live horses are inspected before slaughter; the meat is again inspected after slaughter; and all carcasses and parts of carcasses are similarly inspected and only those which are passed by the officials and stamped in accordance with the United States laws and regulations issued thereunder are packed and transported and sold.

The Meat Inspection Act of 1906 regulates the use in interstate commerce of any meat and meat food products (34 Stat. 674). By Act of Congress approved July 24, 1919, this Meat Inspection Act was amended by what is known as the Horst Meat Act to include, within the scope of its provisions and the regulations promulgated thereunder, horse meat and horse meat products. Pursuant thereto the most detailed regulations were promulgated by the United States Department of Agriculture. By those enactments the Federal Government has set up a complete and comprehensive scheme governing the processing, labelling, transportation and sale of horse meat in so far as it is an article of interstate commerce.

Congress having acted in this field, the question is, what power, if any, is left to the various states and municipalities? What a state may do in a field of commerce, which is national in its character, in the absence of congressional action, in the face of congressional action, or by express congressional permission, has been the subject of much litigation. No attempt will be here made to harmonize or even to summarize the decisions of the United States Supreme Court on this subject. The effect of the commerce clause on the power of the states to regulate interstate commerce is the subject of a learned article by Professor Noel T. Dowling, of the Columbia Law School, in which he seeks to find an underlying philosophy in the decisions of the Supreme Court of the United States in this field. In

that article there is to be found a painstaking analysis of the important cases on the subject (Interstate Commerce and State Power, 27 Va. Law Review, 1). Mr. Justice Stone in South Carolina *v.* Barnwell Brothers (303 U. S., 177, 185) said that "it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation, in the absence of Congressional action, has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints" (see also Graves *v.* N. Y. ex rel. O'Keefe, 306 U. S. 466, 477, N., 1; United States *v.* Darby, 312 U. S., 100, 119, and cases cited).

Here the field of commerce has been determined to be national in character; Congress has legislated with respect to it with the utmost particularity and has not seen fit, by express legislation, to remove the impediment to state control as it did for the sale of liquor, or convict-made goods (Leisy *v.* Hardin, 135 U. S., 100, 109; Clark Distillery Co. *v.* West Overland RR., 242 U. S., 111; Whitfield *v.* Ohio, 297 U. S., 431). Perhaps the leading federal case applicable here is Collins *v.* New Hampshire (171 U. S., 30), where the Supreme Court of the United States held that a statute of New Hampshire prohibiting the sale of oleomargarine, as a substitute for butter, unless it were of a pink color, was invalid as an unlawful interference with the freedom of interstate commerce.

Even in a field of commerce, national in character, which Congress has affimatively entered by legislation, the state is not entirely excluded from action. The tendency of the cases has been to recognize that both the state law and the federal law may prevail provided they are not inconsistent; if they are in conflict the federal law has precedence. Just how far a state may go is not clearly defined by the cases. All that can be said is that there seems to be a trend to take a more realistic view of the doctrine of "Congressional preemption," and to consider the balancing of national and of state interests in the field. Has a state under its reserved police power really attempted to encroach upon the national

prerogative? Has Congress spoken in such a way as to "silence state action" on the subject? Discrimination against commerce will, of course, not be tolerated, but it has frequently been held that a state has a certain residual power fairly to regulate products of interstate commerce where such regulation is reasonably required by considerations of public health and safety or to prevent fraud and deception (see for example Smith *v.* St. Louis & S. W. Ry., 181 U. S., 248; Rasmussen *v.* Idaho, 181 U. S., 198; Patapsco Guano Co. *v.* North Carolina, 171 U. S., 345, 357, and the cases cited in South Carolina Highway Dept. *v.* Barnwell Bros., 303 U. S., 177, 185, 191; California *v.* Thompson, 313 U. S., 109, 114; Savage *v.* Jones, 225 U. S., 501).

The extent and the particularity of federal legislation on the subject has a most important bearing on the scope of the state's power to act. Congress may leave part of the subject open to state action. Congress by its legislation may occupy only a limited field, in which event the state under its reserved police power may be free to act as to the remainder in a manner that will not conflict with the federal legislation on the subject. As has heretofore been indicated, Congress has initiated the most detailed legislation with respect to horse meat and a federal agency, pursuant to Congressional authorization, has adopted a closely knit body of regulations not only in the interests of the public health, but to prevent fraud and deception. The scope of the state's action relating to the same subject matter is therefore greatly restricted. For example, the regulations of the United States Department of Agriculture, which have the force of law, provide that no coloring matter may be injected except such as the department considers harmless and these "only with the approval of and in such manner as may be designated by the Department."

Unquestionably, the purpose behind the amendment is a good one. The record shows the existence of a real evil to be guarded against. There have been a number of instances where horse flesh has been fraudulently sold as beef. This is an offense, and those detected have been punished; but such detection is fraught with many difficulties. There is no doubt as to the power of the state or the municipality to adopt reasonable measures designed to prevent the per-

petration of a fraud on the consuming public in connection with the sale of food products, even if no question of public health is involved (cf. Hygrade Provision Co. *v.* Sherman, 266 U. S., 497, upholding the constitutionality of sections 435 and 435-a of the Penal Law dealing with false labels and misrepresentations in the sale of food products and the sale of Kosher meat and meat preparations).

Clearly, despite Congressional action in this national field, the city would have the right to inspect horse flesh brought here from other states, and to require a permit for the sale of horse flesh; it could require the most detailed records to be kept by wholesalers and dealers in horse meat here; it could prohibit the sale of horse flesh in any establishment where other meat products intended for human consumption are kept or offered for sale; it could require labels and signs to prevent the likelihood of deception or of confusion. These requirements are all embodied in section 327 of the Sanitary Code, and their constitutionality is not challenged in this action. Perhaps even more stringent requirements may be imposed along these lines and wholesalers held to stricter accountability, both for the improper and fraudulent diversion of their product by those to whom they sold it.

But there is a distinct limit to the proper sphere of state action in this field. The challenged amendment to the Sanitary Code constitutes a direct impediment to the use of horse flesh in a manner specifically authorized by federal law. The Sanitary Code amendment makes a person selling horse flesh guilty for doing something which Congress has specifically permitted him to do. The requirements of the amendment materially obstruct the exercise of rights conferred by the federal legislation.

For example, the requirement artificially to color the horse flesh is in direct conflict with the federal regulations that horse flesh shall not be artificially colored, except with the approval of the federal agency. If it is sought to require a certain amount of bone to be ground with the horse flesh, that would be in direct conflict with the specific authorization of a federal agency to sell the horse flesh, passed and approved by it, without any bone content. Indeed to require a certain percentage of ground bone con-

tent would make the horse flesh unfit and even dangerous for human consumption.

The views here expressed find support in the most recent decision on this general subject handed down by the Supreme Court of the United States on June 11, 1945, in Hill *v.* State of Florida (No. 811, October Term, 1944). There the court held that certain provisions requiring business agents of labor unions to be licensed and requiring every local labor union to file a report with the secretary of state were invalid as an intrusion upon the federal policy and scheme concerning labor unions set forth in the Wagner Act. The court in the prevailing opinion said: "Our holding is that the National Labor Relations Act and Sections 4 and 6 of the Florida Act as here applied cannot 'move freely within the orbit of their respective purposes without infringing upon one another' (Union Brokerage Co. *v.* Jensen, 322 U. S. 203, 207)."

So it may be said with equal force in the case at bar, that a state or municipality to require the decharacterization of horse meat which has previously been approved as fit for human consumption pursuant to federal legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (Hines *v.* Davidowitz, 312 U. S. 52, 67; Cloverleaf Butter Co. *v.* Patterson, 315 U. S. 148; Napier *v.* Atlantic C. L. R. R., 272 U. S. 605).

The requirement for decharacterization is not only invalid under the prevailing view in Hill *v.* State of Florida (supra) but it is in conflict with the tests laid down in the dissenting opinion in that case.

A municipality may not therefore in regulating the sale of goods in interstate commerce, so as to prevent fraud and deception, require a change in the natural physical character of an unadulterated product declared to be a healthful, legitimate article of food moving in interstate commerce by a federal agency acting pursuant to congressional authorization. If there is to be a valid requirement for decharacterization of horse flesh moving in interstate commerce it must be as the result of co-operative and not conflicting state and federal action on the subject.

Judgment is accordingly directed in favor of the plaintiff for the relief demanded in the complaint. Settle judgment in accordance with the foregoing determination.

APPENDIX "C"

Opinion by Hon. Edward R. Koch, Justice of the Supreme Court of the State of New York, upon Motion Granting Temporary Injunction.

(Reported in 182 Misc. 742)

Hill Packing Co. v. *City of New York, et al.*—This is a motion for a temporary injunction during the pendency of this action, enjoining and restraining defendants, and each of them, their agents, servants and employees, from taking any steps to enforce section 327 of the Sanitary Code of the City of New York, as amended in the month of August, 1943, as against the plaintiff, a dealer in horse meat, or the products of the plaintiff, both in transport from the place of business of the plaintiff to the State of New York and to the City of New York, and the sale and disposition thereof within the State of New York and the City of New York until the entry of final judgment, &c.

Section 327 of the Sanitary Code, as amended, reads as follows: "Section 327: Slaughtering of Horses and Sale of Horse Flesh Regulated. 1. The business of slaughtering horses shall not be conducted in the City of New York. No horse flesh shall be brought into, transported or held, kept or offered for sale in said city without a permit therefor issued by the board of health or otherwise than in accordance with the terms of said permit and the regulations of said board. Such permits when issued shall specify 'For Animal Consumption' or 'For Human Consumption.' 2. No carcass or part of a carcass of a horse shall be brought into the City of New York or held, kept, sold, offered for sale, or given away in said city until it shall have been inspected and passed as fit for human food by a duly-authorized inspector of the United States Department of Agri-

culture, and shall have been marked, stamped or branded as having been so inspected and passed, or in the case of parts of a carcass unless such parts shall have been cut from a carcass or part of a carcass which had previously been inspected and passed and so marked, stamped or branded as hereinbefore provided. 3. Horse flesh shall not be used as an "ingredient of or in the preparation of any mixed food intended for human consumption. 4. Horse flesh, whether alone or combined with other ingredients intended for animal feed, shall not be brought into the City of New York, transported or held, kept, stored, or offered for sale or sold unless decharacterized by harmless coloring, or otherwise in a manner and with materials satisfactory to the Department of Health. This provision, however, shall not apply to horse flesh sold and transported to the New York Zoological Society or the Park Department of the City of New York."

The plaintiff contends that the ordinance is void, both in so far as it attempts to regulate the sale of horse flesh for human consumption, and also as it attempts to regulate the sale for animal consumption, but seeks an injunction only as it affects the transportation and sale of horse flesh for animal consumption, inasmuch as the plaintiff has not in the past, nor is now, engaged in selling horse flesh for human consumption within the City of New York. The plaintiff contends that the ordinance is invalid because it places an undue burden on interstate commerce in connection with an article of commerce which the United States Government, through the bureau of animal industry and the department of agriculture, has declared to be fit for human consumption; that it is invalid because it is discriminatory because of the provision in subdivision 4 of section 327 providing that the section shall not apply to horse flesh sold and transported to the New York Zoological Society or the Park Department of the City of New York; that the ordinance is invalid because of idefiniteness in that it provides that "horse flesh must be decharacterized by harmless coloring matter or otherwise in a manner and with materials satisfactory to the Department of Health"; that it is invalid because it is not in reality a licensing statute but is in effect a statute prohibiting the sale of horse meat for

human consumption, because on plaintiff's application for a license it was advised by the Board of Health that "it was decided that the department would not consider applications to sell horse flesh for human consumption"; that it is invalid because it bears no reasonable relation to health and is therefore not within the police power of the Board of Health of the City of New York.

The moving papers establish that the plaintiff has substantial property rights which are affected by the section and is one of the largest companies engaged in the slaughtering, sale and distribution of horse flesh, both for human and animal consumption in the United States; that it sells its products throughout various states in the Union and in foreign countries. The plant of the plaintiff is located in Kansas and the horse flesh, to the amount of hundreds of thousands of pounds, is shipped to the City of New York after having been frozen at plaintiff's plant in Kansas, packed into cartons, remaining in its frozen state until it is distributed from the storage plant in the City of New York in the original package.

There are three types of this frozen horse meat: (1) Chunks of meat; (2) ground meat, and (3) ground meat mixed with ground bone. As to types 1 and 2, the cartons bear the following legend: "U. S. Inspected and passed by Department of Agriculture Est. E-83."

The plaintiff contends, and it is not contradicted, that the effect of this legend is that the United States Department of Agriculture, Bureau of Animal Industry, has pronounced the horse meat fit for human consumption.

The ground horse meat which is mixed with bone (number 3 above referred to) does not bear the legend above set forth, but merely one which indicates that the article has been prepared in an establishment operating under federal meat inspection.

The plaintiff argues that the indefiniteness of the section is indicated by the fact that various measures approved by the board of health for decharacterization of the horse meat were later rescinded and other methods substituted, and further that the regulations adopted by the bureau of animal industry provide that no products shall contain any dye, preservation, or added chemical except as permitted,

by certain other sections of the regulations, and that all these sections provide that any added matter, even harmless coloring matter, must be with the approval of and in such manner as may be designated by the bureau of animal industry. That, by virtue of the indefiniteness of the ordinance in respect to defining exactly what is meant by decharacterization, regulations of the board might well require some form of decharacterization which might not be approved by the bureau of animal industry, thereby rendering impossible the transportation of plaintiff's product in interstate commerce.

Plaintiff's moving papers contain affidavits and other matter indicating that horse meat is equal in nutritive value to beef and other meats used for human consumption, and that it is used by a great many people, and that it has also been used very largely as a diet for dogs and other animals for many years. Plaintiff alleges that for the last seven years it has been distributing horse meat in the State of New York and that its business was steadily increasing, and that since the date of the enactment of the ordinance—section 327—the business has decreased to approximately one-half of its former volume.

The defendants point out that the plaintiff is not restricted in the sale of horse flesh to customers outside the City of New York, provided shipments are made by common carrier; they are also not restricted to sales to United States Government agencies; they may sell horse flesh with bone as they did prior to the enactment of the new regulations, and they may also sell horse flesh decharacterized with any of the materials suggested by the health department, and argue that the rights of the plaintiff have not been invaded; that the section protects the health of the inhabitants of the City; that the City had the power to pass the legislation, and that under the police power the wisdom of its action cannot be questioned.

There is no doubt that the state has power to pass laws protecting the health of the public and that the state may delegate that power to municipalities, and, further, that the Sanitary Code is an exercise of the police power and has the force of law (Lieberman *v.* Van de Carr, 199 U. S., 552; People ex rel. Lodes *v.* Department of Health, 189 N. Y.,

187; People, &c., French Bottling Works, Inc., 259 N. Y., 4; People, &c., *v.* Kehoe, 246 N. Y., 592). It is settled law that in the absence of illegality, arbitrariness or capriciousness the provisions of the Sanitary Code should be sustained by the court, and there is a presumption of constitutionality which must be overcome by the plaintiff (Pacific States Co. *v.* White, 296 U. S. 176; Matter of Stubbe *v.* Adamson, 220 N. Y. 459). While, with certain exceptions, the City has no power to legislate with reference to a product sold in interstate commerce, it still has regulatory powers with relation to articles affecting the public health, and the police power extends to imposing restrictions having reasonable relation to preserving the public health. The nature and extent of such restrictions are matters for legislative judgment and are within the power of the state unless palpably unreasonable and arbitrary.

The issues presented are substantial. Horse flesh is a food product and a lawful article of commerce. As such any statute which attempted to exclude it from importation into a state from another state where it was either processed or grown, would be violative of the United States Constitution (Shollenberger v. Pennsylvania, 171 U. S. 1). While a state and, a fortiori, a self-governing municipality, has power to regulate the introduction of a food product, such regulation must be enacted for the purpose of insuring the purity of the article, to prevent fraud and deception, or to promote honesty and disclosure in relation to the production and selling of the article (Shollenberger v. Pennsylvania, supra; People, &c., *v.* Guiton, 210 N. Y. 1). The regulating statute, however, may not impose such conditions which if complied with will effectually amount to a prohibition (Collins v. New Hampshire, 171 U. S. 30). In determining whether a statute is prohibitory or not, the "direct and necessary result of a statute must be taken into consideration, even if that result is not in so many words either indicated or distinctly provided for. In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect" (Collins v. New Hampshire, supra, p. 34; Henderson v. Mayor of New York, 92 U. S. 259; Morgan SS. Co. v. Louisiana, 118 U. S. 455). Laws passed by states in the exercise of their

police powers which are not in conflict with the laws of Congress upon the same subject, are valid laws even though incidentally affecting interstate commerce (Silz v. Hesterberg, 211 U. S. 31). It follows, therefore, that plaintiff's products may not be excluded from the City of New York, but that regulatory ordinances may be enacted concerning them provided their effect is not prohibitory. The regulations heretofore set forth affect a product which the United States Government, through its Bureau of Animal Industry, has designated as fit for human consumption. Section 327 does not seek to regulate the purity of the horse flesh imported for animal consumption and no dispute appears to exist as to the quality of the plaintiff's product. Neither does the section tend to prevent fraud and deception or to promote honesty and disclosure in relation to the plaintiff's product. The plaintiff's product is unquestionably horse flesh, looks like horse flesh in its natural state and is properly marked as is required by the applicable federal regulations. No attempt is made by the plaintiff to pass off its product as something that it is not. The mere fact that horse flesh in its natural state looks like beef is not sufficient reason to compel the plaintiff "to decharacterize" it by the use of a foreign substance such as fish oil, charcoal, dyes, or other methods that might be suggested by the defendant (Collins v. New Hampshire, supra). The applicable federal regulations provide: "No meat product shall contain any substance which impairs its wholesomeness, nor contain, except as permitted by paragraphs 2, 3 and 8 of this section, any dye, preservative or added chemical (paragraph 1). Only harmless coloring matter may be added and then only with the approval of and in such manner as may be designated by the department" (paragraph 3, section 6, regulation 18). To require plaintiff to add a "decharacterizing" agent "satisfactory" to the city's health department, might well result in inability by the plaintiff to meet these provisions in the federal regulations. The language of section 327 is indefinite as to the nature of "decharacterization" which might be required, and being of the nature of a penal statute definiteness is required (People v. Briggs, 193 N. Y. 457). Section 327 therefore would seem to be an improper interference with interstate

commerce and violative of the plaintiff's constitutional rights. A purchaser of horse flesh, even for animal consumption, should not be forced to purchase a discolored or befouled meat unless a compelling reason exists therefor. It is well known that animals are governed by their sense of smell and might refuse to eat meat treated with codliver oil or other "decharacterizing" agents. Animal owners may justifiably object to the unpleasantness and inconvenience of the handling of "decharacterized" horse flesh. The addition of the foreign substance suggested for "decharacterization" might very well excite a prejudice and repugnance to the point of positive refusal to purchase. The decreased sales by the plaintiff of its horse flesh containing ground bone is evidence of this fact. Such a result would make the regulation prohibitory and thus an interference with interstate commerce (Collins v. New Hampshire, supra). The question is presented as to whether the enactment of section 327 was a proper exercise of the police power and as such sustainable, even though it indirectly affects interstate commerce. From affidavits presented on this motion there appears to be little doubt that the plaintiff's horse flesh has found its way into channels leading to human consumption. It must be recognized that there is general public antipathy to the use of horse flesh for human consumption. Whether or not this antipathy is justified, it is not unreasonable to assume that many persons would be disturbed emotionally, perhaps physically, should they learn that they had partaken of horse flesh. To protect the consuming public from being defrauded is important and greatly to be desired. The fact that providing this protection is difficult or arduous does not justify the enacting of a law which is destructive of individual property rights (Good Humor Corp'n v. City of N. Y., 290 N. Y. 312). The fact that wrongdoers might misuse or abuse a proper article of commerce is not sufficient reason to change its real character. If wrongdoing exists it should be attacked directly and the wrongdoers dealt with accordingly. The innocent, however, should not be made to suffer because of the possibility of wrongdoing. It would seem that section 327 has no reasonable relation to the purpose sought to be accom-

plished by its enactment and is therefore unjustified (Slight v. Kirkwood, 237 U. S. 53).

Subdivision 4 of section 327 provides: "Horse flesh * * * shall not be brought into the City of New York, transported or held * * * unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health." To comply with this part of the section the plaintiff would be compelled to perform acts without the City of New York before it could even "transport" its product through the City of New York. While the defendants assert they have not attempted strict enforcement of this provision, the law as enacted makes provision for such enforcement if the defendants so desire. The plaintiff may not be compelled to rely upon the beneficence or laxity of the defendants, but rather should be governed in the conduct of its business by provisions which are understandable and definite. Certainly the defendants have no power to compel an act outside of the City of New York which regulates plaintiff's conduct in conducting its business in interstate commerce. Regardless of the purpose of the defendants in enacting section 327, they have exceeded their authority in an illegal and arbitrary manner not justified by the police powers admittedly resident in them. The remaining contentions of the plaintiff also have merit. Section 327 specifically provides (subdivision 4) "* * * This provision, however, shall not apply to horse flesh sold and transported to the New York Zoological Society or the Park Department of the City of New York." This exemption is discriminatory in that it favors the New York Zoological Society, a private corporation, and the Park Department of the City of New York over the plaintiff or customers of the plaintiff. The argument urged on behalf of the defendants that horse flesh sold to an agency or department of government will not reach the hands of the consuming public, and therefore need not be decharacterized, is specious. If wrongdoing is to be guarded against, no person or group should be exempt from proper supervision.

The motion for a temporary injunction is therefore granted. Settle order.

(8699)

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IN THE

Supreme Court of the United States

October Term, 1946

No. 940

HILL PACKING COMPANY,
Petitioner (Appellant),

vs.

THE CITY OF NEW YORK, WILLIAM O'DWYER,
Mayor of the City of New York, *et al.*

PETITION FOR REHEARING

To the Supreme Court of the United States and the Judges thereof:

Comes now the above named Appellant, Hill Packing Company and by its counsel presents this, its petition for an order of this Court granting to the petitioner a rehearing of the above entitled cause. While this is presented in the form of a petition for a rehearing it is in fact a petition for a hearing.

The decision of this Court, dated May 12th, 1947, was rendered when the Court had before it merely a statement as to jurisdiction. There were before the Court no briefs, the appeal had not been argued and the contentions of your petitioner that the ordinance complained

of came into conflict with the federal statutes and regulations governing the sale and distribution of petitioner's products had not been presented to the Court. They were not so presented because petitioner believed that it was incumbent upon petitioner to present the preliminary question as to jurisdiction. That preliminary question petitioner felt was so clear that this Honorable Court would note probable jurisdiction. Having noted such probable jurisdiction petitioner believed it would then be entitled to present its argument in briefs submitted to the Court and to argue those contentions before the court.

Because the court did not have the benefit of those briefs and argument we feel that the court failed to recognize that the local ordinance came into direct conflict with the federal statutes and regulations. We feel that upon an examination of the local regulations and the federal regulations this court will recognize that under its decision in *Rice* v. *Board of Trade,* Nos. 471 and 473, October Term 1946, and in *Rice* v. *Santa Fe Elevator Corporation,* Nos. 470 and 472, October Term 1946, the ordinance complained of is clearly unconstitutional because it collides with the Meat Inspection Act (34 Stat. 1260, 21 U. S. C. Secs. 71-94), the Horsemeat Act (41 Stat. 241, 21 U. S. C. Sec 96) and the regulations thereunder promulgated by the Department of Agriculture effective November 1st, 1922, as amended (Title 9, Code of Federal Regulations, 1945 Supplement, Secs. 251-279).

Your petitioner urges that if the course suggested by Mr. Justice Reed and Mr. Justice Rutledge had been adopted, and probable jurisdiction had been noted we could have convinced this Court that there is such collision between the federal and the local regulations. We shall attempt in this petition to point out how these regulations do conflict. In support of your petitioner's contentions we respectfully show:

(1) The appeal directly involved the constitutionality of Paragraph 4, Section 327 of the Sanitary Code of the City of New York, as amended. The decision of the Court of Appeals upheld the constitutionality of the ordinance in so far as it affected your petitioner's product. The appeal from that decision therefore lay as a matter of right to this Court.

This Court has recognized that it had jurisdiction because it took jurisdiction and affirmed the judgment of the Court of Appeals.

Section 327 of the Sanitary Code of the City of New York, as amended, is printed in full at page 3 of our Statement as to Jurisdiction filed with this Court. Paragraph 4 of that ordinance, the validity of which is directly involved in this appeal, reads as follows:

> "4. Horseflesh, whether alone or combined with other ingredients, intended for animal feed shall not be brought into the City of New York, transported, or held, kept, stored, or offered for sale or sold unless decharacterized by harmless coloring or otherwise in a manner and with materials satisfactory to the Department of Health. This provision, however, shall not apply to horseflesh sold and transported to the New York Zoological Society or the Park Department of The City of New York."

(2) The appeal herein is from a judgment and order of the Court of Appeals of the State of New York which, in effect, has decided that the ordinance does not, insofar as it affects appellant's product, conflict with federal legislation and that the Appellant herein, must follow the ordinance's demands as to decharacterization until the federal government announced a different method of decharacterization. The aforesaid Court of Appeals also held that the ordinance was sufficiently definite and certain, was within the legislative competence of the City to

enact, was consonant with the requirements of the due process clause, and did not constitute an invalid delegation of legislative power. The opinion of the Court of Appeals is printed at page 11 of our Statement as to Jurisdiction filed with this Court.

(3) The appeal herein from the judgment and order of the Court of Appeals of the State of New York was allowed by the Chief Judge of the Court of Appeals on October 18, 1946 and the case was docketed and the record duly filed in this Court on January 23rd, 1947.

(4) On May 12th, 1947, without affording counsel the opportunity to present the points relied upon and without permitting counsel to argue the merits of the appeal, this Court entered the following order in a *per curiam* decision:

> "*Per Curiam*: The judgment is affirmed. Rice v. Board of Trade of the City of Chicago, Nos. 471 and 473, October Term, 1946, decided May 5, 1947. Mr. Justice Reed and Mr. Justice Rutledge agree only that probable jurisdiction should be noted. Mr. Justice Douglas took no part in the consideration or decision of this case."

(5) Petitioner respectfully urges that this Court in affirming the judgment of the Court of Appeals has erred. Petitioner respectfully submits that had petitioner been given an opportunity to file a brief and to argue the merits of the appeal, the judgment of the Court of Appeals would have been reversed.

Had petitioner been permitted to file a brief, among the contentions therein urged, would have been the following:

POINT I

The local ordinance, the validity of which was involved on this appeal, directly collides with the federal statutes and regulations in a field which the federal government has completely preempted.

Petitioner, a Kansas corporation, is engaged in the business of purchasing and slaughtering of live horses, purchasing carcasses of horses from various states, preparing and packing such horseflesh and vending and transporting its equine products throughout the various states of the Union and foreign countries.

Every operation of petitioner's packing plant at Topeka, Kansas, is continuously under the direction and control of the officials and inspectors of the Bureau of Animal Industry, a branch of the United States, Department of Agriculture. All live horses are inspected before slaughtering, the meat is again inspected after slaughtering, and all carcasses and parts of carcasses are similarly inspected, and only those which are passed by the officials and stamped in accordance with the federal regulations, are packed, transported and sold. Not only are the carcasses and parts of carcasses stamped as required by the act and regulations, but the container is stamped before shipment.

The horseflesh so shipped is frozen at petitioner's plant, packed into the cartons, tightly closed and stapled with metal staples, and reaches petitioner's distributor in New York City in its frozen state, where it is stored and distributed by the New York agent in its original package.

The undisputed testimony is that petitioner's horseflesh is absolutely fit for human consumption, is attractive in appearance, pleasant in flavor and equal in nutritional value to beef and other recognized meats used for human consumption.

As this Court pointed out in *Rice* v. *Santa Fe Elevator Corporation, supra,* when Congress legislates in a field which the States have traditionally occupied, the historic police powers of the State are superseded only in certain situations. They are superseded where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. R. Co.* v. *Public Service Com.*, 250 U. S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148. The police power of the States is so superseded where the State also may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U. S. 538.

As this Court said, it is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police powers of the States undisturbed, except as the state and federal regulations collide.

In the case at bar we shall endeavor to point out that the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress intended that the States shall retain no powers to legislate with reference to horsemeat which is used in interstate commerce. Whether or not, however, that scheme of federal regulation is so pervasive as to exclude any state action or whether it merely excludes state regulations not in conflict with the federal requirements is unnecessary to decide in the case at bar.

As was said by this Court in *Rice* v. *Board of Trade, supra,* if the state regulation violates the standards of the federal regulation or collides with the rules of the Secretary of Agriculture those state regulations are superseded under the federal rule.

In the case of *Rice* v. *Board of Trade* the federal and the state regulations did not conflict. Moreover, the Illinois Commerce Commission had not approved or adopted

any rules and therefore it could not be known whether there was any conflict with the federal law.

In our case Congress has acted, the Department of Agriculture has promulgated regulations by virtue of the authority conferred by Congress, the City of New York has acted and has acted in a manner so as to come in direct conflict with the entire scheme of federal regulation.

We desire to point out to the Court federal statutes and regulations thereunder controlling horsemeat as an article of interstate commerce.

By act of Congress approved March 4, 1907 (34 Stat. 1260, 21 U. S. C. 71-94), the Meat Inspection Act was passed. This Act regulates the use in interstate commerce of meat and meat food products.

The purpose of the Act is to prevent the use in interstate commerce of meat which is unsound, unhealthful, unwholesome or otherwise unfit for human food (21 U. S. C., Sec. 71). To effectuate this purpose the Secretary of Agriculture was given the power to promulgate rules and regulations for the enforcement of the Meat Inspection Act (21 U. S. C., Sec. 71). The Act provides for the examination by inspectors appointed for that purpose, both post-mortem and ante-mortem, for the marking, stamping or labelling as "Inspected and Passed" of meat found to be sound, healthful, wholesome and fit for human food and for the condemnation of all such meat as is unfit for human consumption (21 U. S. C., Sec. 72).

The Act further provides that any meat which contains dyes, chemicals, preservatives or ingredients which make such meat or meat products unsound or unwholesome or unfit for human food shall be destroyed by the inspectors (21 U. S. C., Sec. 74).

The Act further provides that all meat which has been "Inspected and Passed" shall be placed in a receptacle; that receptacle shall have a label which states that the contents thereof have been inspected and passed (21 U. S. C., Sec. 75).

The Act makes violators guilty of a misdemeanor and subject to punishment by fine not exceeding $10,000 or imprisonment for a period of not more than two years, or both (21 U. S. C., Sec. 88).

While the provisions of the Meat Inspection Act apply only to cattle, sheep, goats and swine, the Horsemeat Act (41 Stat. 241, 21 U. S. C., Sec. 96) makes all of the provisions of the Meat Inspection Act applicable to horsemeat.

Pursuant to the provisions of the Meat Inspection Act and the Horsemeat Act, regulations were promulgated by the appropriate federal agencies (9 CFR, 1945 Supp., Secs. 251-279).

These regulations, in order to effectuate the purpose of the act and in order to prohibit the use in interstate commerce of unwholesome meat provided a comprehensive scheme to carry out this basic purpose.

Section 252.3 of the Meat Inspection Regulations provides:

> "Every establishment in which horses are slaughtered for transportation or sale as articles of interstate or foreign commerce * * * which are capable of being used as food for man, shall have inspection in accordance with the terms prescribed in Section 279 of this subchapter."

Section 279 of the Regulations provides which horse slaughtering establishments shall have inspection, the separation of establishments where horses are slaughtered from those in which other animals are slaughtered, provision for ante-mortem and post-mortem inspection, the marking and labelling of horse carcasses and parts of carcasses, the branding with green ink instead of the purple ink used on beef, the labels for horsemeat or horsemeat products, the exporting of horsemeat and stamps and certificates required for that purpose, and

generally provides that all of the other regulations governing the inspection of meat are made applicable to the inspection of horsemeat, except where they are specifically inapplicable.

All of these regulations deal with horsemeat which is capable of being used as food for man.

Section 268.12 of these Regulations, which was relied on by the Court of Appeals of the State of New York, in deciding that there was no conflict insofar as your petitioner's product was concerned, deals not with horsemeat which is capable of being used as food for man and has been so pronounced after inspection by the Department of Agriculture.

The last cited section deals only with "dog food or similar uninspected article". It specifically provides under (a) "When dog food, or similar uninspected article is prepared * * *." It specifically provides under (b) as to what shall be required when "dog food or similar uninspected article" is prepared in an establishment which is not an edible product establishment. It speaks throughout of the preparation of the uninspected product. It is obvious that in (c) the Regulations in using the words "dog food" and providing that it shall be distinguished from articles of human food, are speaking of dog food or similar uninspected article as distinguished from horsemeat which has been inspected and has been pronounced as fit for human consumption.

The ordinance makes no such distinction.

The ordinance, Section 327 of the Sanitary Code of the City of New York, subsection 2, provides:

> "2. No carcass, or part of a carcass of a horse shall be brought into the City of New York, or held, kept, sold, offered for sale or given away in said city, until it shall have been inspected and passed as fit for human food by a duly authorized inspector of the United States Department of Agriculture and

shall have been marked, stamped or branded as having been so inspected and passed, or, in the case of parts of a carcass, unless such parts shall have been cut from a carcass or part of a carcass which had previously been inspected and passed and so marked, stamped or branded as hereinbefore provided."

The effect of this portion of the ordinance is to permit the sale for human consumption of horsemeat which has been inspected and passed as fit for human consumption by the United States Department of Agriculture.

Section 4 of that ordinance then provides that that same product which may be sold shall not be sold unless decharacterized if it is intended for animal feed. The ordinance is, therefore, in direct conflict with the entire scheme of federal regulation. The federal scheme permits the sale of horsemeat where it has been inspected and passed by the Department of Agriculture. Whether the intention be to sell it for human consumption or whether the intention be to sell it for animal feed is immaterial under the federal scheme.

When horsemeat is intended for animal feed the ordinance requires it to be decharacterized, even though it consists entirely of inspected meat which has been pronounced as fit for human consumption by the United States Department of Agriculture. This, we contend, brings the local and the federal regulation into direct conflict.

The very scheme is in conflict because the federal scheme of regulation places horsemeat in two categories (a) horsemeat which is fit for human consumption, and (b) horsemeat which is an ingredient of an animal food which consists partly of uninspected horsemeat.

The purpose of the federal scheme of regulation is to prevent the distribution for human consumption of horsemeat which is not fit for human consumption. This,

whether the horsemeat is sold as uninspected meat or is a component part of a dog food or similar uninspected article.

The local ordinance which permits the sale for human consumption, if the horsemeat is government inspected, prevents the sale of that very same horsemeat if it is intended for animal consumption, unless the horsemeat be decharacterized.

The federal regulation requires decharacterization only to distinguish a product which is not fit for human consumption from a product which is fit for human consumption. The purpose is to prevent the distribution to the public of deleterious and unwholesome food.

This can in no conceivable sense be the purpose of the local ordinance because the very same meat which may be sold for human consumption without decharacterization must be decharacterized if it is intended for animal feed.

In the *Rice* case, cited by this Court, in affirming the Court of Appeals, the Court pointed out that no actual conflict existed because there had been no impact of any specific order of the state agency on the Federal Act or the regulations of the Secretary thereunder.

In our case there has been an actual impact because the very provisions of the ordinance which are attacked as unconstitutional create that impact. As we see it, therefore, the basis of the decision in our case must have been that the enactment of the local agency did not come in conflict with the Federal Act and the regulations of the Secretary thereunder. This was in fact the basis of the decision by the Court of Appeals. The Court of Appeals said that both under Federal and local law the petitioner is required to decharacterize its product.

As we have pointed out above the only provision for decharacterization is found in Section 268.12, which does not apply to your petitioner's product. Petitioner's

product is U. S. Government inspected horsemeat fit for human consumption and not dog food or other uninspected article.

Thus in the case at bar there exists federal legislation under which rights have accrued to petitioner, to pack, transport and sell its product in interstate commerce. Yet when this same product while in interstate commerce is transported in its original carton (see *Leisy* v. *Hardin*, 135 U. S. 100; *Savage* v. *Jones*, 225 U. S. 501, 520; *Shollenberger* v. *Pennsylvania*, 171 U. S. 1, 22) into the City of New York or is held or stored by the petitioner in the City of New York, it becomes subject to confiscation by the local authorities and petitioner becomes liable to criminal penalties.

What this court said in *McDermott* v. *Wisconsin*, 228 U. S. 115, is clearly applicable to the facts in the case at bar. This court said:

> "Conceding to the State the authority to make regulations consistent with the Federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the Government and the shipper, and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject."

In *Cloverleaf Co.* v. *Patterson, supra*, the State condemned what the federal laws permitted, a situation similar to that presented in the case at bar. This court there said (p. 169):

"Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory, while it was under federal observation and while federal enforcement deemed it wholesome, would not only hamper the administration of the federal act but would be inconsistent with its requirements. Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was federal regulation of the materials and composition of the manufactured article, there could not be similar state regulation of the same subject."

POINT II

The ordinance in question violates the due process clause of the Constitution of the United States.

A. We believe that on the first ground urged herein, the ordinance is clearly invalid. But we go further and say that even though it be held that the ordinance did not conflict with federal law, nevertheless it is invalid. We contend that in compelling petitioner to introduce a foreign substance into a product which is wholesome and fit for human consumption, the ordinance in effect prohibits the sale of a legitimate article of commerce, and thus deprives petitioner of its property without due process. Any federal legislation which compels the adulteration of a wholesome product as this ordinance does, would also be unconstitutional for the same reasons.

Petitioner's product is horsemeat which is wholesome and nutritious. It looks like horsemeat. It is sold as

horsemeat in packages clearly labelling the contents as such, and there is no attempt on petitioner's part to pass it off as anything else.

The ordinance does not prohibit petitioner from introducing a foreign substance into the product which would give it an appearance calculated to deceive the purchasing public. On the contrary, it compels the introduction of a foreign substance in order to change the nature and appearance of the product.

In requiring the petitioner to decharacterize its wholesome product, the City of New York has acted in complete disregard of the law as settled by this court in the *Oleomargarine* cases. (*Plumley* v. *Massachusetts*, 155 U. S. 462, *Shollenberger* v. *Pennsylvania*, 171 U. S. 1, *Collins* v. *New Hampshire*, 170 U. S. 30).

Before it became generally recognized as a staple food product two states attempted to legislate with reference to oleomargarine. In the *Shollenberger* case the State of Pennsylvania enacted a statute to prohibit the importation of oleomargarine into the State. This Court held that a State had no right to prohibit the introduction within its borders of an article of commerce which in its pure state is healthful.

In the *Collins* case the State of New Hampshire sought to accomplish the purpose of the Pennsylvania statute as to oleomargarine by enacting a law prohibiting the importation of oleomargarine unless it was of a pink color. The purpose of this statute was very much like the ordinance in the case at bar, that is, to prevent public deception. In the oleomargarine case the statute was to prevent people from buying oleomargarine in the belief that it was butter. In the ordinance under consideration the avowed purpose is to prevent people who buy horsemeat from believing that it is beef. This Court held the statute invalid because it was in practical effect prohibitory. It stated that the act was a mere evasion of the direct pro-

hibition contained in the Pennsylvania statute and yet, if enforced, the result would be the total suppression of the article. Said the Court:

> "In a case like this it is entirely plain that if the State has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it, in the manner described in the statute. Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. Henderson v. Mayor of New York, 92 U. S. 259; Morgan's Steamship Co. v. Louisiana, 118 U. S. 455, at 462. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

It is our contention that the doctrine of the *Oleomargarine* cases is controlling in the case at bar and that the Court of Appeals of the State of New York in refusing to follow the law laid down in these cases, fell into error which requires reversal by this Court.

B. Not only is the ordinance invalid because it conflicts with federal law and because it is prohibitory in nature, but we respectfully submit the ordinance is invalid as an arbitrary and unreasonable exercise of the police power. The testimony in the record discloses that the ordinance was enacted after some isolated instances in which certain retailers sold horsemeat for beef. In order to prevent the deception practiced in these few cases, the Department of Health of the City of New York amended Section 327 of the Sanitary Code, and among the new provisions included Paragraph 4.

We contended in the courts below and contend here that the few instances of deception which motivated the local authorities to amend the law did not justify the prohibition of plaintiff's product, a legitimate article of commerce. See *Adams* v. *Tanner*, 244 U. S. 590, 594; *Good Humor Corp.* v. *City of New York*, 290 N. Y. 312.

But assuming for the moment that some local legislation was necessary to protect the public against deception, the addition of Paragraph 4 to the other three paragraphs of Section 327 of the Sanitary Code did not, we submit, effectuate such purpose. By the provisions of Paragraph 4 the City created a classification which had no relation to the purpose of preventing fraud. Under Paragraphs 1, 2 and 3 of the ordinance petitioner may bring its product into the City, store it, offer it for sale, or sell it in the City without any requirement as to decharacterization, if such horse meat is intended for human consumption. All that is required where the horsemeat is sold for human consumption is a license. But where that

same horsemeat fit for human consumption is intended for animal food then it becomes subject to the requirement of decharacterization.

Thus the ordinance makes a distinction which is based upon the subjective intent with which the product is sold. Such distinction has absolutely no relationship to the fraud sought to be prevented. The test of the statute, whether the horsemeat is intended for human food or for animal food has no relation whatever to its being palmed off as beef since horsemeat intended for animal food can no more readily be sold as beef than can horsemeat intended for humans.

Obviously the regulations provided in Paragraphs 1, 2 and 3 of Section 327, which are adequate to protect against fraud in the sale of horsemeat intended for human consumption, are adequate where the intention is to sell the same product for animal feed.

It is petitioner's contention that the classification created by the amendment to Section 327 of the Sanitary Code is arbitrary and unreasonable. In *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, the State of Pennsylvania enacted a statute forbidding the use of shoddy in the manufacture of comfortables. This Court found it to be in violation of the due process and equal protection clauses of the Constitution. This Court held that the provision could not be sustained as a measure to protect health, saying at page 414:

> "And the fact that the act permits the use of numerous materials prescribing sterilization if they are secondhand also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary."

Nor could the prohibition be sustained as a measure to prevent deception, because, this court held, the regulations that were adequate to control other articles of bed-

ding could be effectively applied to shoddy filled articles. So, in the case at bar, the measure to control the sale of horsemeat for human consumption was adequate to control horsemeat for animal consumption.

Conclusion

Petitioner respectfully represents to the Court and the testimony in the record discloses, that if Paragraph 4 of Section 327 of the Sanitary Code of the City of New York is enforced in accordance with the judgment of the Court of Appeals of the State of New York, petitioner's business would be seriously affected. The requirement of said Paragraph 4, which prohibits petitioner from transporting its product into the City of New York or storing it in the City unless decharacterized, would work a great hardship on petitioner with no comparable benefit to the general public that would outweigh the harm done. Not only will petitioner suffer from the operation of the ordinance in New York City, but if such ordinance remains operative and municipalities throughout the other States of the Union pass similar restrictive legislation affecting plaintiff's product each with differing requirements as to decharacterization, it would be practically impossible for petitioner to transport and sell its product in interstate commerce.

WHEREFORE, it is respectfully urged that this petition for a rehearing be granted and that the order of this Court affirming the judgment of the Court of Appeals of the State of New York be vacated and that the aforesaid judgment of the Court of Appeals be, upon further consideration, reversed.

Respectfully submitted,

ARNOLD J. BROCK,
Counsel for Petitioner.

Certificate of Counsel

I, ARNOLD J. BROCK, counsel for the above named petitioner, Hill Packing Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay and is in my opinion well founded in law and in fact and proper to be filed herein.

ARNOLD J. BROCK,
Counsel for Petitioner.

No. 940. HILL PACKING CO. *v.* CITY OF NEW YORK ET AL. Appeal from the Court of Appeals of New York. May 12, 1947. *Per Curiam:* The judgment is affirmed. *Rice* v. *Board of Trade of Chicago*, 331 U. S. 247. MR. JUSTICE REED and MR. JUSTICE RUTLEDGE agree only that probable jurisdiction should be noted. *Arnold J. Brock* for appellant. Reported below: 296 N. Y. 668, 69 N. E. 2d 821.